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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 724

Z. T. OSBORN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 350 F. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1965. A petition for rehearing was denied on October 8, 1965. The petition for a writ of certiorari was filed on November 5, 1965. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to admit, in corroboration of a witness' testimony, a recording of petitioner's conversation with the witness which had been taped pursuant to court authorization.

2. Whether testimony by district judges regarding their authorization of the taped recording was properly admitted in rebuttal.

3. Whether petitioner was entrapped as a matter of law.

4. Whether a portion of the court's instruction on entrapment constituted plain error.

5. Whether petitioner's conduct constituted an endeavor to obstruct justice, within the meaning of 18 U.S.C. 1503.

STATUTE INVOLVED

18 U.S.C. 1503 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, * * * or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than

$5,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of corruptly endeavoring to influence, obstruct and impede the due administration of justice in that court in the trial of James R. Hoffa by requesting, counseling and directing Robert D. Vick to contact a member of the petit jury panel, and to offer him the sum of $10,000 to vote for an acquittal, in violation of 18 U.S.C. 1503.[1] Petitioner was sentenced to imprisonment for three and a half years (1 R. 5-9, 734-735). The court of appeals affirmed.[2]

Petitioner was one of the defense counsel in *United States* v. *James R. Hoffa and Commercial Carriers* (known as the "Test Fleet case") which was tried in the United States District Court for the Middle District of Tennessee, October 22 to December 23, 1962 (1 R. 123-124, 440-441). The jury in that trial did not agree on a verdict, and a mistrial was declared (1 R. 401). There followed a grand jury investigation, which resulted in the indictment of Hoffa for jury tampering (1 R. 162). Robert D. Vick, a local officer who had done investigative work for petitioner

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[1] The indictment contained two other counts charging similar offenses with respect to an earlier trial of Hoffa. The government dismissed as to count 3 and petitioner was acquitted on count 2 (1 R. 154, 734-735).

[2] "1 R." and "2 R." refer to the appendices of appellant and appellee, respectively, in the court of appeals.

on the composition of the petit jury in the Test Fleet case, was re-employed in a similar capacity by petitioner in connection with the new charges (1 R. 159-160, 193, 195-196). After some preliminary communications by Vick to representatives of the Department of Justice (1 R. 224, 250-254), he talked with Walter Sheridan of the Department in July or August 1963. Vick explained that he needed a "clean bill of health" in order to continue in his job, which had been transferred from the county to the City of Nashville. Sheridan asked Vick to report any illegal activities by the defense in connection with the approaching trial of Hoffa for jury tampering, making clear that he was not interested in any of the legal activities of the defense (1 R. 161-168, 199, 216, 225-226).

In October 1963, petitioner employed Vick to do investigative work regarding the composition of the jury panel assigned to one of the two judges in the district since it was anticipated that members thereof might be drawn in the other judge's court, where the Hoffa case was to be tried (R. 197, 219). On November 7 or 8, Vick, while in petitioner's office in Nashville, mentioned that he knew some of the prospective jurors. Petitioner, according to Vick, jumped up and said, "You do? Why didn't you tell me?" Both then went outside and discussed the matter in the alley. Vick told petitioner that one juror—Ralph A. Elliott —was a cousin. Petitioner directed Vick to see if any arrangements could be made about the case (1 R. 200-201).

Vick reported this conversation to Sheridan (1 R. 198-199, 203). Vick's affidavit concerning this conversation was submitted by agents of the F.B.I. to the two district judges in Nashville, and they authorized the government to have Vick record subsequent conversations with petitioner (1 R. 383). On the following day, a tape recorder was concealed on Vick's person, and he returned to petitioner's office and thereafter conversed with him again in the street (1 R. 177, 202-203). Petitioner told Vick to let the juror state the amount he would need and then to double it; *i.e.*, if Elliott wanted $5,000, Vick was to offer him $10,000. The conversation was not recorded because the device did not operate properly (1 R. 203-205). On a second trip the following day, the recorder again failed to function (1 R. 179-180).

A third visit was made by Vick to petitioner's office on November 11. This time the conversation was recorded. Vick testified at the trial to the substance of this conversation and was subject to cross-examination (1 R. 205-210). A complete transcript of this recording, admitted by petitioner to be substantially correct (1 R. 426), is set forth in the opinion of the court of appeals (Pet. App. 4-11). In this conversation Vick represented to petitioner that he had visited Elliott and had cautiously brought up the reported refusal of $10,000 by a juror in the Test Fleet case; that Elliott had said that the man was crazy and should have taken it; and that Elliott was receptive to the idea of "five now and five later." Petitioner instructed Vick to tell Elliott that "it's a deal," and he

detailed the conditions under which payment would be made. Petitioner also told Vick to assure Elliott that "there will be at least two others with him."

On November 15, petitioner was asked to appear before both district judges in chambers. After advising petitioner of his rights, the senior judge asked petitioner if he had "any information concerning any plan or efforts to tamper with this jury or concerning any acts which have taken place for such purpose." Petitioner answered that he had not contacted or talked with any person for that purpose; that, on the contrary, he had been extraordinarily careful to have the people with whom he was working avoid any such implication (1 R. 363-366, 369-381). On the following day, petitioner and his counsel, appearing in response to an order to show cause why he should not be disbarred, were told of Vick's affidavit and the tape recording (1 R. 366-367, 381-385).

On November 19, petitioner appeared alone before the senior judge and asked for an immediate hearing (1 R. 367-369, 385-386). After stating that no promises or inducements had been made to him and that his statement was completely voluntary, petitioner asserted that he had first told Vick not to communicate with his cousin, but that when Vick raised the subject again, petitioner agreed because he was "susceptible to this thing", and was "conditioned for it" (1 R. 389-390). Petitioner also said that Vick had returned and reported that Elliott wanted $10,000, half when he was seated and half when the trial was over, and that petitioner had said that was "all right." Petitioner admitted having told Vick to assure Elliott

not to worry because there would be other people with him on the jury, but said that the statement had been false and was made in order to encourage Vick to make a deal. Petitioner said that his thinking had not reached the question of what he would do if Elliott were actually seated; that he had no intention of seeing it through and that he had hoped and prayed that he himself would "have challenged the man." He said that he had no authorization from Hoffa or anyone else to contact jurors or to pay them money (1 R. 392-396, 430-432). Petitioner's testimony at trial was substantially to the same effect (1 R. 459-465).

ARGUMENT

1. Petitioner principally urges this Court to overrule its decision in *Lopez* v. *United States*, 373 U.S. 427, holding admissible in evidence a recording of a conversation between an Internal Revenue Agent and the defendant who offered him a bribe.[3] Petitioner also distinguishes *Lopez* on the ground that the prior judicial authorization here rendered the recording impermissible. We submit that not only is there no reason to reconsider the *Lopez* decision, but that its

[3] Petitioner also urges the Court to overrule *Olmstead* v. *United States*, 277 U.S. 438, 455, and *On Lee* v. *United States*, 343 U.S. 747, but the factual situations there differ from the present case. *Olmstead* involved wiretapping of telephone conversations without the knowledge of either party to the conversation. *On Lee* involved the admission of testimony by a person who electronically overheard a conversation between a government informant and the defendant, after indictment, where the informant was not produced as a government witness and was not subject to cross-examination.

result is patently correct when, as here, there has been some prior judicial determination that use of a recording device is justified. See 373 U.S. at 464 (dissenting opinion). The judges were not, as petitioner suggests, "stepping down into the arena" to bring an offender to justice when they authorized the government to seek more definite proof of Vick's allegations than his sworn statement. They did not then manifest any conviction that petitioner was guilty; indeed, their testimony indicates that they shared government counsel's skepticism as to the truth of Vick's allegations (1 R. 658-660).

2. It was proper rebuttal for the district judges to testify as to the circumstances which occasioned their authorization of the recording. The thrust of the defense was that the government had deliberately ensnared petitioner into conduct which he would otherwise have shunned. The judges' testimony was part of the government's answer to this allegation. It demonstrated that the recording—which was the most critical piece of evidence—was not obtained until after the judges were persuaded that there was a reasonable basis for further investigation. Vick's affidavit, previously excluded, was properly admitted at this point to show the basis for the judges' action. The seriousness with which the judges regarded the situation was not an adverse reflection upon petitioner's character. Indeed, it amounted to a recognition of his reputation for good character.

3. There was ample evidence from which the jury could infer that petitioner was not entrapped into committing this offense. The jury could properly be-

lieve Vick's testimony that, as soon as he mentioned having a cousin on the jury panel, petitioner inquired why he had not been told sooner, and then discussed this opportunity in greater detail. In addition, various statements made by petitioner in the course of the recorded conversation demonstrate that he was actively in charge of the endeavor to bribe Elliott and was not a reluctant accessory. Finally, petitioner's own account is hardly more favorable than Vick's on this issue. At best, petitioner's version shows that he seized, without undue persuasion, on Vick's suggestion that he could communicate with a prospective juror. Vick's initiation of this idea does not establish entrapment as a matter of law any more than does an undercover informant's request to purchase narcotics from a defendant. Petitioner, a member of the bar, can hardly claim entrapment because of an acquaintance's mention of relationship to a prospective juror, or even on account of the other's suggestion that the relative might be bribed. Such statements merely "afford opportunities" for the commission of a crime; they do not constitute inducement. *Sorrells* v. *United States*, 287 U.S. 435, 441-442; *Sherman* v. *United States*, 356 U.S. 369, 372.

Petitioner also urges that the jury should not have been allowed to consider in support of count 1 the occurrences regarding the Test Fleet trial, which framed the basis of count 2, on which petitioner was acquitted. However, when a defendant claims entrapment he becomes subject to an "appropriate and searching inquiry into his own conduct and predisposition." *Sorrells* v. *United States*, 287 U.S. at 451.

The jury could have acquitted on count 2 because it was not satisfied that petitioner had the necessary intent with regard to that abortive attempt and still have properly considered his participation as bearing upon his predisposition to commit the offense charged in count 1. Moreover, petitioner's own admissions, with respect to count 2 were particularly relevant with respect to his predisposition to commit the offense charged in count 1. *Knight* v. *United States*, 310 F. 2d 305 (C.A. 5).

4. The court gave a lengthy instruction on entrapment, and petitioner challenges only its concluding language. After defining entrapment with reference to the facts of this case, the court instructed (1 R. 697-698):

> * * * With respect to the first count of the indictment, it has been, as you know, contended by the defendant Osborn throughout the trial that he was the victim of an unlawful entrapment * * * and that because of such unlawful entrapment the evidence aforesaid under the first count is not valid, and because of the unlawful nature of same, Count, One should not be permitted to stand and the defendant, therefore, should prevail at your hands with respect to that particular count of the indictment.
>
> If you find in accordance with the defendant's contention aforesaid, and, incidentally, the burden is upon the Government to prove beyond a reasonable doubt the evidence aforesaid was not procured through unlawful entrapment, then you will find for the defendant on this particular count of the indict-

> ment and return a not guilty verdict on Count One.
>
> If, on the other hand, you find on the facts and circumstances of this case and on the instructions as here given you by the Court that the evidence aforesaid, including the tape recording, was obtained by lawful means, that is, that there was no unlawful entrapment, you will find this particular issue against the defendant and your verdict on Count One would be for the Government.

This instruction obviously did not say to the jury "that if they found that the recording was lawfully obtained, they should find that there was no entrapment and return a verdict of guilty" (Pet. 21). It speaks of the "evidence aforesaid", which refers to *all* the evidence on count 1, including, *inter alia*, the tape recording. Moreover, it instructs the jury to find for the defendant on "this particular issue", not on the question of guilt or innocence. Counsel did not except to this charge (1 R. 703), and it was patently not "plain error" if it was error at all.

5. Petitioner urges briefly that there was no actual "endeavor" to obstruct justice because Vick had no intention to contact Elliott and never did contact him (Pet. 21). This contention is met by *United States* v. *Russell*, 255 U.S. 138, where it was held that the word "endeavor" is broader than "attempt" and that "it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent" (*id.* at 143). When petitioner first urged Vick to contact Elliott, he violated 18 U.S.C. 1503. See *Caldwell* v. *United States*, 218 F. 2d 370 (C.A.D.C.), cer-

tiorari denied, 349 U.S. 930; *Knight* v. *United States*, 310 F. 2d 305 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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